

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 March 2006

BALCA Case No.: 2005-00166
ETA Case No.: P2003-CA-09540486

ROMEO RAMIREZ,
Employer,

on behalf of

LILIA RAMOS,
Alien.

Appearance: Ruth Shamir, Esquire
Los Angeles, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone***
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Housekeeper.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

* Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c). This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on

STATEMENT OF THE CASE

On April 13, 2001, Employer, Romeo Ramirez, filed an application for labor certification to enable the Alien, Lilia Ramos, to fill the position of Housekeeper. (AF 122). The position required three months of experience.

On September 30, 2004, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification on the basis of the rejection of a U.S. worker for other than lawful, job-related reasons.¹ (AF 117). The CO found that there was only one applicant, whose resume was forwarded to Employer on November 21, 2002. Employer sent a certified letter to the applicant on December 2, 2002, requesting that the applicant attend an interview on December 12th or call to reschedule. The applicant was also requested to bring "proof" of her "qualifications, experiences and any additional documentation" which would help Employer make a decision on her qualifications. When the applicant did not call, an attempt was made to contact her by telephone on December 17, 2002 and a message was left with the person who responded to the call. The applicant called back the same day and an appointment was scheduled for December 27, 2002, for which the applicant did not appear. Employer concluded, therefore, that the applicant was an unreliable person.

The CO raised the following issues regarding Employer's recruitment of this one applicant: (1) Employer's letter requesting unspecified proof and documentation may have been discouraging; (2) Employer failed to produce the return receipt so it was not known when the applicant received the letter, and without knowing when the letter was received, the telephone call on December 17, 2002 did not appear timely; (3) Employer failed to identify the assistant who telephoned the applicant and the CO was concerned that it may have been Employer's

behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

² The second issue raised in the NOF was not a basis for the denial of certification, as stated in the Final Determination. Therefore the second issue and Employer's rebuttal thereto will not be detailed herein.

attorney who contacted the applicant; and (4) scheduling the interview for December 27th was even more untimely and the delay of more than a month from when the application was forwarded to Employer may have been discouraging. Employer was directed to document how the U.S. worker was recruited in good faith and rejected solely for lawful, job-related reasons.

Employer submitted rebuttal on October 28, 2004. (AF 23). Employer contended that it received the U.S. applicant's resume on November 25, 2002 and found that her stated experience as a housekeeper was restricted to cleaning duties as found in the Dictionary of Occupational Titles under "housekeeper, cleaner" and "commercial or institutional cleaner" while the position offered was that of a "general house worker" or "housekeeper, home." Employer stated that despite this fact, it invited the applicant to discuss her qualifications and asked if she had experience in general house worker job duties not listed in her resume. The certified letter was sent on December 2, 2002, however the letter was returned with a notation "Return to Sender," and received by Employer on January 6, 2003. Employer argues that the finding that its letter was discouraging was mere speculation and without basis, given that the applicant did not receive the letter. Employer further argues that the letter was a normal way of advising an applicant what to bring to an interview and that it was a common and acceptable practice for an employer to ask for written proof of an applicant's qualifications during an interview. Employer contended that its office assistant spoke to the person who answered the telephone, and advised that person that she was calling in connection with the application for the housekeeper job opening, and that the assistant's boss had sent the applicant a letter regarding an interview for December 12, 2002, but the applicant had not shown up. A telephone number was left for the applicant to return the call and when she did, an interview was scheduled for December 27, 2002, at the applicant's suggestion. Included with the rebuttal was a copy of the envelope sent to the applicant, indicating it was mailed on December 2, 2002 and returned to Employer on December 19, 2002. (AF 28).

A Final Determination was issued on November 12, 2004. (AF 11). The CO found that no contact was made with the applicant before December 17, 2002, almost a month after her resume was forwarded to Employer, and that the telephone call on December 17, 2002 was

already untimely, irrespective of whether the applicant was at that time not available until December 27th for an interview. The CO found that the applicant's failure to show for an interview on December 27th was not sufficient to establish that she would not have been available if contacted in a timely manner. The CO further found that the applicant's resume showed more than three months of experience cleaning houses. That the employment was through agencies that referred house cleaners to homes and possibly other establishments did not have any bearing on whether she was a qualified housecleaner with three months of experience in the job. The CO concluded that Employer failed to demonstrate that the applicant lacked three months of experience cleaning private homes. Labor certification was denied.

Employer requested review of the denial by letter dated December 9, 2004. (AF 8). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

DISCUSSION

In its Request for Review, Employer argues that the CO erred in finding that the contact with the applicant was untimely. Employer argues that contact was made seven days after receipt of her resume, as the letter was sent on December 2, 2002 and the resume was received on November 25, 2002. Employer argues that the CO completely neglected to mention Employer's timely attempt to contact the applicant in his Final Determination. According to Employer, the CO also erred in stating that the first contact attempted was the December 17, 2002 telephone call. Employer further contends that the CO erred in finding the applicant seemingly qualified despite her resume listing only experience in cleaning homes, while the instant position required the preparation and serving of meals. Employer also reiterates that its request to provide proof of qualifications was not discouraging.

20 C.F.R. §656.21(b)(6) requires that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons. Although the regulations do not explicitly state a "good faith" requirement in regard to

post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Actions which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are a basis for denying certification.

An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes, so that the applicants will know that the job is clearly open to them. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). There was only one applicant for the position at issue. Employer provided no indication to the CO that it made a timely effort to contact this one applicant apart from a certified letter sent on December 2, 2002, despite the fact that the applicant's resume also included a telephone number. Given that there was only one applicant for the position, Employer's failure to attempt any other means of contact in a timely manner is indicative of a lack of good faith recruitment. In *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where an employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employee's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. Similarly, Employer herein sent a certified letter and did no more until December 17, 2002. This is not indicative of a good faith effort. Also troubling is Employer's assertion that this applicant did not have experience in cooking, when her resume explicitly shows that her duties as a Housekeeper/Cleaner from 1994 to 2001 included doing laundry, cooking and cleaning. (AF 145). Employer's attempts to contact this applicant were neither sufficient nor timely. It does not appear that Employer's efforts to recruit this U.S. worker were made in good faith. Labor certification was properly denied and the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.